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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 47.

FOX FILM CORPORATION,

Petitioner,

v.

A. B. MULLER,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

We understand that respondent has elected to file no new brief on the present hearing, but to stand on his brief filed at the last term. Nothing in his arguments on the questions of the effect of the decree in the *Paramount* case, the severability of the illegal provisions of the Standard Exhibition Contract or the applicability of the decisions of this Court under the Sherman Anti-Trust Act calls for reply. The purpose of this brief is to deal briefly with certain other arguments made or suggested therein

Respondent's argument (Point V) that the contracts sued upon lack mutuality and are therefore unenforceable.

In the first place, the issue of mutuality is not available to respondent in this Court. In the amended answer respondent put in issue all of the allegations of the complaint except those describing the parties (R. 9, 2), and specially pleaded illegality (R. 9-18), lack of mutuality (R. 18-20, 12-13) and failure of petitioner to seek arbi-

tration (R. 20): In the stipulation, however, he admitted all of the essential allegations of the complaint (R. 22, 2-8), excepting only "the allegations, where made, that the failure to play or pay for said pictures were *wrongful* or *unlawful*"; and he explained this exception as follows: "The defendant claiming that said contracts were illegal in this, that they violated the Sherman Anti-Trust Act of the United States" (R. 22). This issue of illegality was thus made the sole issue in the case and the issue of mutuality was entirely ignored in the findings of fact, conclusions of law and opinions of the lower courts (R. 50-56, 64-70, 57-63, 73, 77-83, 104). When this Court reviews a decision of a state court based on an erroneous determination of a federal question, a non-federal question which has been eliminated and ignored below cannot be raised for the purpose of sustaining the decision. *Grayson* v. *Harris*, 267 U. S. 352, 357, 358; *Ward* v. *Love County*, 253 U. S. 17, 25.

But the defense of lack of mutuality was utterly without merit, in any case.

Respondent's argument is that petitioner's promise was illusory because it could exclude all of the photoplays from the license by either "roadshowing" them or withholding them from "general release" and thus avoid performing its promise to license them (Respondent's Brief, pp. 30-31). But under the contract, petitioner had no right to "roadshow" more than two of the photoplays (Main Brief, pp. 49-50, 46-48) and there was probably an implied duty to "generally release" at least some of them (see *Miller* v. *Robertson*, 266 U. S. 243, 250-252; *Southwest Dairy Products Co.* v. *Coffee & Moore*, 62 F. (2d) 174, 175 (C. C. A.,

5th Circ.); *Transcontinental Petroleum Co.* v. *Interocean Oil Co.*, 262 Fed. 278, 279-280 (C. C. A., 8th Circ.); *Wood* v. *Duff-Gordon*, 222 N. Y. 88). Moreover, as to the suggested expedient of avoiding its promise by excluding the photoplays from "general release", petitioner could accomplish this only by withholding from all exhibitors all of the forty-six photoplays contracted for by respondent. This would obviously involve a radical disruption of petitioner's production program for the year. A promise is not illusory when the promisor can avoid performance only by incurring a detriment of this sort. See *Petroleum Refractionating Corp.* v. *Kendrick Oil Co.*, 65 F. (2d), 997 (C. C. A., 10th Circ.); *Imperial Refining Co.* v. *Kanotex Refining Co.*, 29 F. (2d) 193, 195-199 (C. C. A., 8th Circ.); *Ramey Lumber Co.* v. *John Schroeder Lumber Co.*, 237 F. 39, 43 (C. C. A., 7th Circ.) certiorari denied, 242 U. S. 644; *Select Pictures Corp.* v. *Australasian Films*, 260 Fed. 296, 297-299 (D. C., S. D. N. Y.); *Green* v. *Lovejoy*, 155 Minn. 241, 193 N. W. 173; *City of Marshall* v. *Kalman*, 153 Minn. 320, 190 N. W. 597, 599; *Trainor* v. *Buchanan Coal Co.*, 154 Minn. 204, 191 N. W. 431; *Williston, Contracts*, § 104.

There can be little doubt that if the Minnesota Supreme Court had passed upon the question of mutuality it would have followed its decisions cited above rather than the earlier case of *Bailey* v. *Austrian*, 19 Minn. 535, cited by respondent (Brief, pp. 31-32), which has been frequently considered and distinguished in that court (see *City of Marshall* v. *Kalman*, *supra*, p. 599) and has been criticized elsewhere (see *In re United Cigar Stores Co.*, 8 F. Supp. 243, 244 (D. C., S. D. N. Y.); *Williston, Contracts*, § 104).

Respondent's argument (Point VI) that the Minnesota Court decided no federal question.

Respondent's defense to the effect that the contracts sued upon violate the Sherman Anti-Trust Act and are therefore illegal and void (R. 9-18, 22) presented a federal question. See *Nutt* v. *Knut*, 200 U. S. 12; *Bement* v. *National Harrow Co.*, 186 U. S. 70; *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165. In sustaining the defense, the lower court necessarily decided that federal question.

There is no merit in any implication in respondent's Point VI that this Court is bound by the state court's determination of the question of severability. If the federal question necessarily depends upon the determination of that question, and if this Court were concluded by the state court's determination thereon, its exercise of jurisdiction to review the federal question would be futile. The jurisdiction of this Court to review state court decisions is not thus fettered. See *Stanley* v. *Schwalby*, 162 U. S. 255; *Schlemmer* v. *Buffalo, Rochester & Pittsburgh Ry. Co.*, 205 U. S. 1, 11; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Enterprise Irrigation District* v. *Farmers' Mutual Canal Co.*, 243 U. S. 157, 163-164. *Stanley* v. *Schwalby*, *supra*, was an action of trespass to try title to certain land. The defendants asserted that title to the land was in the United States and that they held the land under authority of the United States. The decision of the federal question depended upon whether, when the United States took a deed to the land, the attorney who acted for it had notice of a prior unrecorded deed to one McMillan. The state court concluded that the attorney did have such notice and accord-

ingly decided in favor of the plaintiff. This Court considered the question of notice, reached a different conclusion and reversed the state court's decision. In deciding that it could review the state court's conclusion on the question of notice, this Court said (pp. 278-279):

* * * * *

> "But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. * * *
>
> The decision of the Court of Civil Appeals that the United States had notice of the deed to McMillan, and therefore had no title in the land, and judgment should be rendered against their officers for both title and possession, was a decision in matter of law against the validity of the authority set up by those officers under the United States; and as such was reviewable by this court, and, being erroneous, must be reversed."

The Minnesota trial court's conclusion on the question of severability, which is set forth in the guise of a finding of fact (No. XIII, R. 55-56, Main Br. p. 9), is no more binding upon this Court than is the higher court's decision on that question. This so-called finding is so intermingled with and dependent upon the ultimate question of law as to be in substance and effect nothing more than a decision of the latter. A "finding" of this sort is not conclusive

upon this Court. See *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, 223 U. S. 573, 591-594; *Cedar Rapids Gas Co.* v. *Cedar Rapids*, 223 U. S. 655, 668-669; *Creswill* v. *Knights of Pythias*, 225 U. S. 246, 261-262; *Southern Pacific Co.* v. *Schuyler*, 227 U. S. 601, 602; *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593; *Truax* v. *Corrigan*, 257 U. S. 312, 324-325; *First National Bank* v. *Hartford*, 273 U. S. 548, 552-553; *Norris* v. *Alabama*, 294 U. S. 587, 590. Even if the so-called finding on the question of severability were a genuine finding of fact, it would not be conclusive upon this Court because it is without evidence to support it. See *Creswill* v. *Knights of Pythias*, *supra*, p. 261; *Southern Pacific Co.* v. *Schuyler*, *supra*, p. 611; *Northern Pacific Ry. Co.* v. *North Dakota*, *supra*, p. 593; *Truax* v. *Corrigan*, *supra*, p. 324.

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